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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LUCIA LAI, Plaintiff and Appellant, v. WING C. LEE and BRUCE J. LEVITZ, Defendants and Respondents.	A102477 (San Francisco County Super. Ct. No. 321227)

Appellant Lucia Lai appeals the trial court's entry of summary judgments in favor of each of the respondents, attorneys Wing C. Lee (Lee) and Bruce J. Levitz (Levitz), in her malicious prosecution action against them. Appellant contends that the lower court erred in granting respondents' summary judgment motions because Lee and Levitz did not address all of appellant's theories of liability in their motions, or show by undisputed facts that they had probable cause to assert each of the charges made in the underlying action, and that the trial court should have granted her motion for reconsideration. Respondents disagree with all of appellant's contentions. We affirm the lower court's judgments.

BACKGROUND

Lee sued appellant on behalf of Bao Situ in a prior action (Situ Action), in which Levitz participated as co-counsel for approximately a month and a half. After judgment was entered in appellant's favor, appellant sued Situ, Lee and Levitz for malicious prosecution.

Lee filed the Situ Action on May 25, 1999, in San Francisco Superior Court. He sought damages for appellant's alleged fraud, intentionally tortious conduct and negligence, for "giving diagnosis of medical conditions and prescriptions of herbs without the benefit of an appropriate license to plaintiff[,]" and for misrepresenting that appellant was licensed to practice "acupuncture" and "give diagnosis of medical conditions and prescriptions of herbs." Appellant's actions allegedly "caused food poisoning and other related injuries to plaintiff." Situ sought as damages her purported hospital and medical expenses, general damages, exemplary damages, and damages for loss of consortium, mental pain and suffering, and unspecified physical injuries.

On April 3, 2000, respondent Levitz associated with Lee as counsel for Situ. Levitz propounded written discovery and participated in several depositions. On May 18, 2000, Levitz withdrew as Situ's co-counsel.

A judicial arbitration was held on June 28, 2000 in the Situ Action, and an award was entered in appellant's favor on all claims on July 6, 2000. Judgment was entered in appellant's favor on August 19, 2000.

On May 10, 2001, appellant filed suit against Situ,[1] Lee and Levitz for malicious prosecution. Appellant based her claim on her contention that the defendants acted without probable cause in bringing the Situ Action "in that they did not honestly and reasonably believe that there were grounds for the action" because of the following purported facts: (1) Situ was never a patient of appellant; (2) appellant had actually written the herbal prescription at issue in the Situ Action for someone other than Situ; (3) Situ did not fill the prescription as she had claimed and, therefore, never ingested the herbal prescription; (4) Situ's medical providers failed to give an opinion that appellant breached the applicable standard of care in making her prescription; (5) Situ's medical providers failed to give a qualified expert medical opinion that Situ became ill due to her ingestion of an herbal tea formula that was toxic; (6) Situ's claimed illness, which

[1] Situ apparently did not answer the complaint, as the record indicates that a default was entered against her on November 15, 2001.

included fatigue, nausea and vomiting, was actually caused by an active and severe case of Hepatitis B disease; and (7) Lai was not required to be licensed.

Appellant alleged that the defendants knew these purported facts, but nonetheless pressed ahead with the Situ Action in order to extort money from appellant and her wealthy husband. Appellant sought approximately $68,000 in damages for the costs and fees she incurred defending herself in the Situ Action, and punitive damages. Lee and Levitz answered the complaint denying all of appellant's contentions.

On August 9, 2002, Lee and Levitz filed separate motions for summary judgment, each contending that the undisputed facts showed that he had probable cause to proceed with the Situ Action. The court granted these motions and issued amended orders stating its grounds for doing so on October 10, 2002. The court found that there was no triable issue regarding probable cause in either instance based on a number of undisputed facts, and overruled appellant's objections to evidence.

On October 18, 2002, appellant moved for reconsideration of the court's granting of respondents' motions for summary judgment based on purportedly new evidence that she had obtained in the deposition of Lee after the court's grant of summary judgment. The court denied appellant's motion, finding that appellant had not satisfactorily explained why she had taken so long to obtain this evidence and, alternatively, that the evidence offered would not change the court's rulings.

On February 26, 2003, the court entered judgment in favor of Levitz. On April 25, 2003, appellant filed a timely notice of appeal of that judgment, as well as notice of her appeal of the anticipated judgment to be entered in Lee's favor. On July 3, 2003, the court entered judgment in Lee's favor.[2]

On June 25, 2004, respondent Lee filed a motion pursuant to California Rules of Court, rule 27(e) for monetary sanctions against appellant. He contends that appellant's appeal is frivolous and made for purposes of harassment and/or other improper purposes,

[2] Although appellant's notice of appeal of the judgment entered in Lee's favor was premature, we consider her appeal of that judgment pursuant to California Rules of Court, rule 2(d).

and that appellant has included matters in the record not reasonably material to the appeal's determination.

DISCUSSION

1. Standard of Review

As we have previously discussed in *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 69 (*Scheiding)*, "A motion for summary judgment must be granted if all of the papers submitted show 'there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law. In determining whether the papers show . . . there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence . . . .' ([Code Civ. Proc.,] § 437c, subd. (c).) A defendant has met its burden of showing a cause of action as no merit if it 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show . . . a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials of its pleading to show . . . a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . .' (*Id.*, subd. (o)(2)) [citations omitted]."[3]

"The trial court's summary judgment rulings are subject to de novo review." (*Scheiding, supra,* 69 Cal.App.4th at p. 69.) "In performing our de novo review, we must view the evidence in a light favorable to [appellant] as the losing party [citation], liberally construing [his] evidentiary submission while strictly scrutinizing [respondents'] own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) We also must affirm the

[3] Code of Civil Procedure section 437c, subdivision (o) was redesignated section 437c, subdivision (p) after *Scheiding*.

trial court's ruling if it is correct on any ground, regardless of the trial court's stated reasons. (*Truck Ins. Exchange v. County of Los Angeles* (2002) 95 Cal.App.4th 13, 20.)

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 (*Aguilar)*, the Supreme Court discussed the standards that must be met by a defendant moving for summary judgment under Code of Civil Procedure section 437c (section 437c). The court noted that California's summary judgment law no longer requires a defendant moving for summary judgment "to conclusively negate an element of the plaintiff's cause of action." (*Aguilar, supra*, at p. 853.) "[A]ll that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action—for example, that the plaintiff cannot prove element *X*." (*Ibid*.) "Summary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not simply point out, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Id.* at p. 854, fn. omitted; accord, *Saelzler v. Advanced Group 400*, *supra,* 25 Cal.4th at p. 768 [burden shifts to the opposing party "upon a ' "showing" ' that one or more elements of the cause of action cannot be established."].) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.)

With these general standards in mind, we turn to appellant's arguments.

2. Respondents Had Probable Cause to Prosecute the Situ Action.

Appellant contends that respondents did not have probable cause to prosecute the Situ Action. To the contrary, respondents had probable cause to prosecute based on the information available to them at the time.

"[I]n order to establish a cause of action for malicious prosecution . . . a plaintiff must demonstrate 'that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice.' " *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 871 (*Sheldon Appel*.)

"[T]he existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury." (*Sheldon Appel, supra*, 47 Cal.3d at p. 875.) "The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted. [Citations.] . . . [I]f the trial court determines that the prior action was objectively reasonable, the plaintiff has failed to meet the threshold requirement of demonstrating an absence of probable cause and the defendant is entitled to prevail." (*Id.* at p. 878, emphasis in original.) In other words, "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164-165.)

An action is legally tenable when "it is supported by existing authority or the reasonable extension of that authority." (*Arcaro v. Silva & Silva Enterprises Corp.* (1999) 77 Cal.App.4th 152, 156, citing *Sheldon Appel, supra,* 47 Cal.3d at p. 886.) An action is factually tenable " 'when a prospective plaintiff and counsel . . . have evidence sufficient to uphold a favorable judgment or information affording an inference that such evidence can be obtained for trial.' " (*Arcaro v. Silva & Silva Enterprises Corp., supra*, at p. 157, quoting *Puryear v. Golden Bear Ins. Co.* (1998) 66 Cal.App.4th 1188, 1195.)

The probable cause standard for malicious prosecution actions is a lenient one, and for good reason. As the Supreme Court has recently noted, "This rather lenient standard for bringing a civil action reflects 'the important public policy of avoiding the chilling of novel or debatable legal claims.' [Citation.] Attorneys and litigants . . . ' "have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . ." ' [Citations.] Only those actions that ' "any reasonable attorney would agree [are] totally and completely without merit" ' may form the basis for a malicious prosecution suit. [Citation.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817.) "In making its determination whether the prior action was legally tenable, the trial court must construe the allegations of the underlying complaint liberally in a light most

favorable to the malicious prosecution defendant. [Citation.]" (*Sangster v. Paetkau, supra*, 68 Cal.App.4th at p. 165.)

Malicious prosecutions may be brought against attorneys as well as parties. (See, e.g., *Sheldon Appel, supra*, 47 Cal.3d 863) An attorney who participates in the wrongful prosecution of an action after its initiation by another may also be held liable for aiding and abetting a malicious prosecution. (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, cited by *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1131, fn. 11.) Attorneys are entitled to rely upon the information provided to them by their clients in the absence of notice of specific, verifiable facts that the information was incorrect. (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 626-627, overruled in part on other grounds in *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973 (*Zamos*).) An attorney who becomes aware of such specific verifiable facts, even after initiating the action, may be liable for malicious prosecution if he or she continues to prosecute the action. (*Zamos, supra.)*[4] On the other hand, "Unless the attorney has notice that the client is providing material false information or factual mistakes, the attorney ' "may, without being guilty of malicious prosecution, vigorously pursue litigation in which he is unsure of whether his client or the client's adversary is truthful, so long as that issue is genuinely in doubt." ' " (*Siebel v. Mittlesteadt* (2004) 118 Cal.App.4th 406, 421, quoting *Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 513, overruled in part on other grounds in *Zamos, supra*, 32 Cal.4th at p. 973, citations omitted.)

We affirm the trial court's determinations that probable cause for prosecuting the Situ Action existed, based upon the factual findings stated in the trial court's amended orders granting summary judgment to both Lee[5] and Levitz,[6] and related undisputed

[4] The California Supreme Court issued *Zamos* on April 19, 2004, after respondents submitted their opposition briefs to the Court, and before appellant's reply. However, its holding does not alter the analysis that we would have undertaken prior to its determination.

[5] Regarding Lee, the trial court found no triable issue regarding probable cause because:

facts. These facts, read together, indicate that Situ contended that she, not feeling well, had gone twice to appellant's office; that appellant had introduced herself as a doctor, given Situ a business card indicating that appellant practiced Chinese medicine, showed Situ a license, told her she performed acupuncture, and asked Situ to refer people to her; that appellant had examined Situ and had given her a prescription for an herbal remedy to her symptoms; and that Situ had become ill immediately after taking appellant's prescribed herbal remedy. Respondents also had information that appellant was not licensed in California to practice acupuncture, diagnose medical conditions or prescribe herbs for illness.[7]

"a. 'Prior to filing the complaint in the underlying action I [Defendant Wing C. Lee] personally conducted an investigation with the Acupuncture Board of the California Department of Consumer Affairs and learned that [Plaintiff] Lai had no California acupuncture license.' . . .

"b. 'On May 30, 1998, Dr. Zhang wrote to Wing C. Lee, in a report Wing C. Lee reviewed before filing the complaint in the underlying action, that Situ had presented herself 'complaining of nausea and vomiting since taking herbal tea after consulting with an herbalist in Chinatown . . . All her symptoms appear to be due to herbal tea intoxication causing acute gastritis' . . . ."

[6] Regarding, Levitz, the trial court found no triable issue regarding probable cause because:

"a. 'During the meeting [Defendant] Lee gave me [Defendant Levitz] some background on the case and told me [Defendant Levitz] that the defendant in that case Lucia Lai is an herbalist that was neither licensed in California to practice medicine nor acupuncture in California.'. . .

"b. '[Defendant] Attorney Lee told me [Defendant Levitz] that plaintiff Situ had gone to [Plaintiff] Lucia Lai for treatment for symptoms of feeling hot, dry mouth, and loss of appetite and that [Plaintiff] Lucia Lai had examined her, diagnosed her condition and prescribed herbal remedies.'. . .

"c. '[Defendant] Lee also showed me [Defendant Levitz] Lucia Lai's prescriptions. Lee explained that [Bao] Situ had used the family name of her common law spouse Philip Lim, which is written as 'Lee.'. . .

"d. Lucia Lai's business card and appointment card . . . .

"e. In Damon Lee, M.D.'s May 27, 1998 treatment notes he reports that Bao Situ felt lightheadedness, vertigo and nausea after consuming a Chinese herbal remedy and vomiting four times. His assessment was vertigo and epigastric pain. . . .

"f. 'Lee also showed me [Defendant Levitz] medical records from Frank Zhang, M.D. of the B.J. Medical Group. Those records indicated that Situ had consulted with Dr. Zhang on May 28,1998 . . . It was Dr. Zhang's impressions that all of the Situ's symptoms were due to the herbal tea intoxication causing acute gastritis.' . . . ."

Lee and Levitz also received information from doctors who examined Situ in the days after she purportedly became ill upon ingesting appellant's prescribed remedy that provided them with probable cause for the Situ Action. Dr. Zhang consulted with Situ on May 28, 1998, and indicated that he thought all of Situ's symptoms "appear to be due to herbal tea intoxication causing acute gastritis." This diagnosis was consistent with that made by Situ's own doctor, Damon Lee, who reported in his May 27, 1998 treatment notes that Situ felt lightheadedness, vertigo and nausea after consuming a Chinese herbal remedy and vomiting four times. His assessment was vertigo and epigastric pain.

Appellant notes that both Dr. Lee and Dr. Zhang would not state in their depositions that appellant's treatment of Situ was malpractice. However, appellant does not point to anything in the record indicating that these doctors disavowed writing the statements contained in their records.

Furthermore, Dr. Karen Yang stated throughout the Situ Action that appellant's prescriptions were wrong for Situ. Dr. Yang saw Situ within days of her alleged tea-induced illness. In support of his motion, Levitz submitted notes of a talk he had with Dr. Yang[8] which indicate she told him that the herbalist made an improper diagnosis and prescribed the wrong remedy for Situ, aggravating Situ's pre-existing Hepatitis B

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[7] The parties do not dispute that appellant was not licensed in California as an acupuncturist or otherwise certified to diagnose illness or practice medicine.

[8] Appellant objected below and to this court to the admission into evidence of Levitz's transcribed and handwritten notes of his conversation with Dr. Yang as purported hearsay, because Levitz was available to testify directly about his meeting with Dr. Yang, and because there was a "serious question" about the authenticity of the notes because they are transcribed and/or not produced in discovery. We independently review the admissibility of evidence submitted regarding summary judgment motions. (*Gatton v. A.P. Green Services* (1998) 64 Cal.App.4th 688, 692.) The trial court properly overruled these objections. Levitz authenticated all of the notes by declaration, as he was allowed to do for the purpose of his summary judgment motion, (Code Civ. Proc., § 437c, subd. (d)) and the notes were not offered to prove the truth of Dr. Yang's statements. (Evid. Code, § 1200.) Appellant provided no support at all for her contention that the documents were somehow not authentic because they purportedly were not produced in discovery.

condition like "oil on fire."[9] Dr. Yang testified at deposition on June 22, 2000, shortly before the June 28, 2000, arbitration, that appellant's prescription was was "no good" for Situ, given her physical condition, and that the herbal prescription was "not right" for Situ.[10]

Appellant contends that Lee and Levitz should have known that Situ never received appellant's prescription because it was made out to a different person, a "Mrs. Lee." However, respondents relied on Situ's representation that she used the name "Lee" because it purportedly was a variant of "Lim," the surname of the man she lived with, who was also the father of her children. Appellant responds that Lee, fluent in Chinese, should have known that "Lee" is not actually a variant of "Lim" in the Chinese language, and that respondents should have been suspicious that Situ did not use her real name. Appellant also contends that respondents "turned a blind eye" to the purported "manufacture" of a travel permit that Levitz relied on in support of his motion for summary judgment, which Levitz contended spelled Situ's "husband's" name with a Chinese character used for "Lee." However, Lee's general knowledge of the Chinese language does not establish knowledge about the variants of Chinese names, and appellant does not point to any notice that respondents had during the Situ Action that any writings on the face of the travel permit were "manufactured." Furthermore, Levitz's notes indicated that Situ told him that her "husband" was also known as "Philip Lee."

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[9] Appellant argues that her own medical expert's opinion that Situ's Hepatitis B condition was the true source of her illness should prevail. This goes to the merits of the Situ Action, but not to those of her malicious prosecution claim. Appellant fails to address respondents' contention that the information available to them during the Situ Action gave them probable cause to allege appellant negligently prescribed a remedy that at least aggravated Situ's condition.

[10] We also have not found any testimony by Drs. Zhang and Lee that constituted "specific, verifiable facts" showing that respondents were relying on false medical information, particularly in light of the probable cause provided by Dr. Yang's continuing opinion that appellant's prescription was, essentially, "no good" for Situ. Therefore, respondents were not obligated to stop their prosecution pursuant to *Zamos, supra*, 32 Cal.4th 958, after hearing the medical testimony given at deposition.

Regardless, the issue is not whether the character for "Lee" is actually a variant of "Lim" in the Chinese language, but whether Situ actually used the name "Lee." Respondents were entitled to rely on Situ's assertion that she did so in the absence of any specific, verifiable facts to the contrary.

Appellant also asserts that respondents should have been suspicious that Situ claimed to have disposed of the remaining prescribed remedy after she became ill. We fail to see how this was particularly suspicious in light of Situ's claim that the tea made her violently ill. It seems just as likely that she would dispose of it because it made her ill as that she would keep it to prove a potential future claim. We do not agree that her contention put respondents on notice that they could not rely on her information.

Appellant relies heavily on *Arcaro v. Silva & Silva Enterprises Corp.* (1999) 77 Cal.App.4th 152 (*Arcaro)*, to argue that Lee and Levitz were put on notice that Situ's information about her visit to appellant was false. The *Arcaro* court found a lack of probable cause for the defendant's prosecution of the underlying action because the defendant provided the plaintiff with specific, verifiable facts that it lacked a case. The defendant had pursued Arcaro for payment of an outstanding credit invoice guaranteed by Arcaro, (*id.* at p. 154) even after Arcaro had informed it that his partner had forged his signature on the credit application. (*Id*. at 155.) Defendant continued to prosecute its action against Arcaro after Arcaro's attorney provided a handwriting exemplar containing ten of Arcaro's signatures within about a month of suit being filed. (*Ibid.*) The court found that defendant had notice that it lacked probable cause to prosecute the action, since "no reasonable person could conclude" Arcaro's exemplar signatures resembled the signature on the credit application, and defendant would be unable to authenticate the signature at trial. (*Id.* at 157.)

Unlike in *Arcaro, supra,* 77 Cal.App.4th 152, there is no indication that Lee or Levitz were ever put on notice during the action of any specific, verifiable facts that the information Situ gave to them was incorrect. Other than her contention that respondents should have known that "Lee" is not a variant of "Lim," appellant asserts two other relevant affirmative "facts" justify reversal. First, she points to her own declaration

statement that she never saw Situ at her offices. Appellant's declaration, however, is dated almost two years after the Situ Action was dismissed. Appellant does not cite to anything in the record showing that Lee or Levitz knew of this contention during the Situ Action.[11] Moreover, appellant does not point to anything in the record besides her own uncorroborated declaration. Levitz, on the other hand, points to telephone records showing calls from a phone used by Situ to appellant's offices around the time Situ claimed to have visited her. Accordingly, appellant's contention, even if known to the respondents during their prosecution of the Situ Action, might have raised an issue of credibility between the parties, but it would not have been a specific, verifiable fact giving respondents notice that they lacked probable cause to pursue the action.

Appellant also claims that Situ did not have appellant's prescription filled. Appellant bases her contention on a declaration by the herbalist for the "Wan Hua Co.," located on Jackson Street in San Francisco, stating that appellant's prescription lacks markings that would show it was handled by him, or by any other herbalist. The herbalist's declaration is dated June 7, 2000, shortly before the June 28, 2000 judicial arbitration in the Situ Action. However, it is not accompanied by a proof of service or other indication that appellant provided this declaration to Lee or Levitz during their prosecution of the Situ Action, nor does appellant cite to anything in the record showing that she did so. Furthermore, unlike in *Arcaro, supra,* 77 Cal.App.4th 152, where the plaintiff gave defendants a verifiable sampling of his actual signature to prove his signature on a credit application was forged, the herbalist's statement leaves room to reasonably believe that he could have filled Situ's prescription, but mistakenly left it unmarked. Moreover, Situ testified that she had the herbal prescription prepared at the "Man Wa or Man Fat" store on Jackson Street in San Francisco, making it unclear from the record that she visited the "Wan Hua Co." at all. For all these reasons, the herbalist's statement that the prescription does not contain his normal notation, even viewed

[11] In a separate statement of facts submitted by appellant in her opposition papers below, she made a citation to her own deposition testimony as well, but that deposition also occurred two years after the Situ Action, in July 2002.

liberally in appellant's favor, does not constitute a specific, verifiable fact that establishes notice to respondents that they lacked probable cause to proceed with the Situ Action.

3. Respondents Had Probable Cause to Prosecute the Negligence Claim.

Appellant next contends that there was no probable cause for Situ's negligence claim against her. This is also incorrect.

Situ's claim asserted that appellant's "negligent conduct of giving diagnosis of medical conditions and prescriptions of herbs without the benefit of an appropriate license proximately caused food poisoning and other related injuries to plaintiff." Appellant contends a lack of probable cause for this claim for several reasons. First, she contends that she was not required to be licensed as an herbalist, citing Business & Professions Code section 4937, subdivision (b) (section 4937, subdivision (b)) as it existed at the time the Situ complaint was filed in 1999. Section 4937, subdivision (b) stated that nothing in its provisions outlining the authority of licensed acupuncturists prevented an unlicensed person from "prescribing the use of . . . nutrition to promote health," so long as the use was "not . . . prescribed in connection with the practice of acupuncture." (Bus. & Prof. Code, § 4937, subd. (b), as amended by Stats. 1987, ch. 1190, § 3.) Other language in the statute suggests the term "nutrition" was intended to include "the incorporation of . . . herbs as dietary supplements to promote health." Appellant contends that she did not violate anything in this section by prescribing an herbal remedy to Situ.

Respondents contend that section 4937, subdivision (b) did not relieve appellant of her licensing obligations because her alleged treatment of Situ went beyond prescribing herbs as a dietary supplement to promote health. Business & Professions Code section 4935 as written in 1999, stated that any unlicensed person who represented that he or she practiced "acupuncture," which by that statute included representations regarding the practice of "oriental medicine" or of expertise in "Chinese medicine," was guilty of a misdemeanor. (Bus. & Prof. Code, § 4935, subds. (a), (c), as amended by Stats. 1997, ch. 400, § 2.) Appellant held herself out to Situ as practicing "Traditional Chinese Medicine," among other things.

Respondents contend that they had probable cause to prosecute because appellant violated other relevant statutes as well. They contend that appellant examined, diagnosed and treated Situ, including by prescribing an herbal remedy for her purported illness, without a license in violation of Business & Professions Code section 2052 (section 2052). Section 2052 is part of a larger Medical Practice Act, which requires medical practitioners to obtain and hold a physician's or surgeon's certificate in order to provide medical care to patients. (Bus. & Prof. Code, § 2050, et. seq.) As written in 1999, section 2052 stated that "Any person who practices . . . or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, . . . disease, . . . or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor." (Bus. & Prof. Code, § 2052, as added by Stats. 1980, ch. 1313, § 2.)

Respondents also point to Business & Professions Code section 2068's (section 2068) regulation of persons providing nutritional advice. Section 2068 prohibits such persons from the unlicensed treatment of a person's physical condition and requires any person in commercial practice providing nutritional advice to post a notice so stating.

Appellant contends, essentially, that section 4937 controls over these statutes, and that appellant did not violate it by her prescription of an herbal remedy to Situ, as she did not diagnose or otherwise treat Situ.

We agree with respondents that they had a tenable argument that appellant acted in violation of the statutes discussed herein in providing services to Situ. Section 2052 bars a person from practicing any mode of treating the sick, or from diagnosing or providing any treatment to anyone for any ailment or physical condition to another without a medical license. This broad language is buttressed further by the all-encompassing definition for "diagnosis" provided in Business & Professions Code section 2038, which includes "any undertaking by any method . . . whatsoever . . . to ascertain or establish

whether a person is suffering from any physical . . . disorder."[12] Similarly, section 2068 makes clear that uncertified persons providing nutritional advice are not authorized to practice medicine or otherwise treat persons for illness. Section 4937 does not allow a person to treat a person's ailments with herbal remedies without an acupuncturist's license. As already discussed, respondents understood from Situ that she visited appellant because she was not feeling well; that appellant had no acupuncture or medical license; that appellant held herself out as a doctor, an acupuncturist and practitioner of "Traditional Chinese Medicine"; that appellant examined Situ's physical condition, such as by taking her pulse; that appellant prescribed an "herbal remedy" for Situ's ailments; and that Situ became ill upon taking that herbal remedy. These allegations were a sufficient basis to maintain a tenable claim that appellant acted outside of the authority provided in section 4937.

Appellant next contends that any alleged statutory violations cannot tenably constitute negligence per se under Evidence Code section 669,[13] and therefore are not relevant to a negligence claim. We disagree. "Under the negligence per se doctrine . . . negligence is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute or regulation; (2) the violation caused the plaintiff's injury; (3) the injury resulted from the kind of occurrence the statute or regulation was designed to prevent; and (4) the plaintiff was one of the class of persons the statute or regulation was intended to protect." (*Daum v. Spinecare Medical Group, Inc.* (1997) 52 Cal.App.4th

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[12] Respondent ignores California's statutory definition for "diagnosis," offering a dictionary definition. The definition in Business & Professions Code section 2038 by its own terms controls for the entire "chapter," which includes the code provisions discussed herein. Therefore, appellant's dictionary definition is irrelevant.

[13] "Section 669 of the Evidence Code sets forth the doctrine commonly called negligence per se. It provides that negligence of a person is presumed if he violated a statute or regulation of a public entity, if the injury resulted from an occurrence that the regulation was designed to prevent, and if the person injured was within the class for whose protection the regulation was adopted. This presumption may be rebutted by proof that the violator did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (*Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 544-545.)

1285, 1306.) The first two elements are generally issues of fact, while the last two are generally issues of law. (*Ibid.*)

Citing certain case law indicating that a lack of a license alone is insufficient to establish negligence per se under certain circumstances (see *Lemuth v. Long Beach Unified School Dist.* (1960) 53 Cal.2d 544, 553-554; *McDonald v. Foster Memorial Hospital* (1959) 170 Cal.App.2d 85, 93-94, overruled in part on other grounds in *Siverson v. Weber* (1962) 57 Cal.2d 834, 839; *Bute v. Potts* (1888) 76 Cal. 304), appellant contends that her failure to obtain any required license was not a cause of Situ's alleged injury and, therefore, cannot be a basis for negligence per se. Appellant's cited case law is not on point, however. Respondents contend that appellant not only lacked an appropriate license, but also that she examined Situ, diagnosed her ailments, and prescribed medical remedies for her ailments in violation of Business & Professions Code sections 4937, 4935, 2052, and 2068. Whether or not appellant or respondents ultimately might win the argument on its merits, which we need not and do not determine here, respondents had a tenable argument that appellant violated a standard of care set forth in statutes such as section 2052 that are intended to protect persons like Situ—that examinations, diagnoses of, and prescriptions for, sick people be made by certified persons only—and caused Situ injury, thereby committing negligence per se. (See *Daum v. Spinecare Medical Group, Inc., supra,* 52 Cal.App.4th 1285 [defendants' failure to inform patient in violation of statute of the experimental nature of an implant merited a negligence per se jury instruction]; *Norman v. Life Care Centers of America, Inc*. (2003) 107 Cal.App.4th 1233, 1246 [facility's care of a plaintiff's deceased mother involved violations of regulations that merited a negligence per se jury instruction]; *People v. Poo On* (1920) 49 Cal.App. 219 [violation of the Medical Practice Act to inquire of a person's illness, examine the person (including taking the person's pulse), and prescribe herbs and medicine for any illness without an appropriate license].)

Finally, appellant contends that respondents had no evidence that she was negligent in her treatment of Situ. Appellant argues that respondents did not have facts sufficient to allege that she failed to meet a professional standard of care, and that none of

the medical practitioners who testified in the case stated anything that suggested she acted negligently in any alleged treatment of Situ. However, appellant does not specify what professional standard of care should be applied to appellant, nor does she explain how any professional standard of negligence that might be applicable to appellant as an unlicensed herbalist would alter a typical negligence analysis.[14] Assuming that appellant is correct that a "professional standard of negligence" must be applied to her work as an "herbalist," she must still conduct herself with the ordinary prudence of one serving that role. (See *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997-998.) The information available to respondents from medical practitioners, discussed in greater detail in section 2 directly above, was sufficient to maintain a tenable claim that appellant did not conduct her duties with the ordinary prudence of an herbalist by prescribing the wrong remedy for Situ's ailments, thereby aggravating Situ's condition.

In short, Situ's claim that she became ill immediately after taking herbal tea prescribed by an unlicensed appellant who had examined her, along with the statements of the medical practitioners who reviewed Situ's condition, were sufficient for respondents to maintain a tenable claim that appellant's negligence caused Situ injury.

4. Respondents Had Probable Cause for Their Fraud Claim.

Respondents also established by undisputed facts that they had a tenable fraud claim, based upon their allegation that appellant misrepresented to Situ that she could practice acupuncture and give diagnosis of medical conditions and prescriptions for herbs.

"A misrepresentation need not be oral; it may be implied by conduct." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567, citing *Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 151 ["A misrepresentation need not be

[14] Appellant also contends in her complaint that respondents lacked probable cause to pursue their action because none of Situ's medical treaters gave a "qualified expert medical opinion" that the herbal tea prescribed was toxic. However, appellant fails to explain why such an opinion might have been required for respondents to file the Situ Action.

express but may be implied by or inferred from the circumstances"].) Depending on the circumstances, "misleading half-truths" may be actionable as misrepresentations as well. (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294.)

Appellant contends that she could not be found to have made any misrepresentation to Situ because she did not claim that she was licensed to practice acupuncture in California. We disagree. According to respondents, Situ contended that appellant represented that she was a practicing acupuncturist, introduced herself as a doctor, and held herself out as a practitioner of "Traditional Chinese Medicine," although appellant was not licensed in California to perform acupuncture or practice medicine. Appellant's representations, viewed in context, contained sufficient implications and half-truths to maintain a tenable claim that appellant made misrepresentations to Situ that Situ relied on in retaining her, submitting to her examination and treatment, and taking her prescribed herbal remedy.

Appellant also contends that the Medical Board of California rejected the claim that she misrepresented herself as a California licensed and practicing acupuncturist. However, appellant does not cite to any real evidence to support this contention, relying instead on her own uncorroborated declaration statement about what the Board supposedly determined on a letter from respondent Lee to the Board that does not reveal anything about the Board's determinations. Therefore, this contention must fail.

Appellant next contends that there is no evidence that Situ relied on her purported misrepresentations about acupuncture, nor evidence that she provided any acupuncture services to Situ. We disagree. "[R]eliance may be established on the basis of circumstantial evidence showing the alleged fraudulent misrepresentation . . . *substantially influenced* the party's choice, even though other influences may have operated as well." (*Sangster v. Paetkau, supra,* 68 Cal.App.4th at p. 170, emphasis in original.) Appellant contends that Situ, who did not read English, could not have relied upon her business card representation that she was an "acupuncturist." This misses the point, since Situ testified that appellant *told* her that she was licensed (although she did not say where she was licensed), and showed Situ a license prior to Situ's consenting to

appellant's examination and treatment. Situ also stated that appellant asked her to refer patients to her. Moreover, appellant's representation of herself as a practitioner of "Traditional Chinese Medicine" arguably constituted a representation that she practiced "acupuncture." (See Bus. & Prof. Code, § 4935, subd. (c) ["A person holds himself or herself out as engaging in the practice of acupuncture by the use of any title or description of services incorporating the words . . . ' "oriental medicine," ' . . . or by representing that he or she is trained, experienced, or an expert in the field of . . . Chinese medicine"].)

5. Purportedly Unaddressed Theories of Liability

Appellant contends that Lee and Levitz did not address her claims that they lacked probable cause for the intentional tort and loss of consortium claims they prosecuted in the Situ Action. Appellant contends that respondents' failure to address these theories of liability in their summary judgment papers requires reversal of the trial court's summary judgment. (See *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 716.) This also is incorrect.

Although respondents do not raise waiver, we find that appellant waived her theory of liability arguments by not properly raising them in her summary judgment opposition papers below. " 'It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal.' [Citation.] 'Generally, the rules relating to the scope of appellate review apply to appellate review of summary judgments. [Citation.] An argument or theory will generally not be considered if it is raised for the first time on appeal.' " (*Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1249.) In her opposition below, appellant asserted in one sentence statements that neither respondent had probable cause for their intentional tort and loss of consortium claims because of certain additional material facts. However, appellant did not actually cite to *any* facts, leaving blank spaces where she refers to additional material facts. Later in her opposition brief appellant stated that if the court found "that anyone [sic] of the ground asserted by defendants was asserted without probable cause their motion must be denied[,]" but stated nothing more specific than "no probable cause

existed for the action filed." Appellant now seeks to elevate her incompetent arguments below to grounds for reversal of the trial court's decision, in effect asking us to consider an issue briefed for the first time on appeal. We decline to do so.

Regardless, even if no waiver occurred here, we agree with respondents that appellant's contention must be rejected because she did not raise theories of liability specifically regarding the intentional tort and loss of consortium claims in her malicious prosecution complaint. It is well settled that " '[t]he function of the pleadings in a motion for summary judgment is to delimit the scope of the issues[.]' " (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) "A defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers." (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4.) Appellant states in her complaint that the Situ Action in its entirety was improper because "[d]efendants acted without probable cause . . . in that they did not honestly and reasonably believe that there were grounds for the action" because of the various "facts" that appellant then listed, which we have summarized in our discussion of the background. Appellant refers to the Situ Action's intentional tort claim only once, and then only as part of a listing of the action's claims, and does not refer to Situ's consortium claim at all. Accordingly, in their summary judgment papers below, respondents focused on refuting the allegations that appellant actually stated in her complaint.

Furthermore, both Lee and Levitz did in effect address the grounds for probable cause to bring an intentional tort claim in their summary judgment motion papers below. Situ's intentional tort claim alleged that "Defendant's intentional conduct of giving diagnosis of medical conditions and prescriptions of herbs without the benefit of an appropriate license proximately caused food poisoning and other related injuries to plaintiff." Both Lee and Levitz specifically referred to Situ's intentional tort claim in their separate statements of undisputed facts and in their memoranda of points and authorities submitted in support of their motions. Both discussed in their memoranda that appellant diagnosed symptoms and prescribed herbs to Situ without a proper license.

Finally, appellant contends that respondents had no probable cause for an intentional tort claim. Our independent research indicates that appellant's practice of "Traditional Chinese Medicine" on Situ without a license could support a tenable claim that appellant committed an intentional tort by acting for her own profit without undergoing the training necessary to obtain a California license, and with "a positive, active and absolute disregard of [her action's] consequences." (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 729, overruled on other grounds in *Aguilar, supra,* 25 Cal.4th at p. 854, n. 19 [quoting *Cope v. Davison* (1947) 30 Cal.2d 193, 201 in a discussion of willful misconduct, and noting that "willful or wanton misconduct is separate and distinct from negligence, involving different principles of liability and different defenses"]; see also *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 106 [an "intentional tort" is seen as "the deliberate or reckless harming of another"].) It has been held, for example, that an action for battery arises when a physician offensively touches a patient for non-therapeutic purposes after obtaining the patient's consent to these touchings with misrepresentations that the treatment was necessary. (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933.) Accordingly, we find that respondents had probable cause for an intentional tort claim.

6. Appellant's Motion for Reconsideration.

Appellant contends that the trial court improperly denied her motion for reconsideration of the summary judgment motions based on purportedly new evidence. Appellant moved for reconsideration pursuant to Code of Civil Procedure section 1008. We affirm the trial court's ruling.

"A trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard." (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.) In order to maintain such a motion, a party must, among other things, "give a satisfactory reason why it was unable to present its 'new' evidence at the original hearing." (*Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 692, fn. 6, overruled in part on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53,

68, fn. 5; see also *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1198-1199.)

The trial court denied appellant's motion for two reasons. First, the court found that there was not an adequate showing as to why the new evidence, obtained in Lee's deposition, could not be obtained before the summary judgment hearing. Second, the court found that the new matter did not change the court's analysis of the initial grant of summary judgment.

Nothing in the record merits reversing the trial court's ruling. Appellant contended that Lee obstructed discovery, but she did not provide the trial court with a sufficient reason why, in an action filed on May 10, 2001, Lee's deposition was not completed until after the September 19, 2002 summary judgment hearing. Appellant also could have, but did not, request a continuance of the hearing pursuant to Code of Civil Procedure section 437c, subdivision (h). Regardless, appellant had more than enough time to complete Lee's deposition prior to the summary judgment hearing if she had prosecuted her case diligently.

Furthermore, we agree that the purported "new" facts do not merit reversal of the court's grant of summary judgment. Appellant contends that Lee's deposition testimony revealed he had no knowledge of a "diagnosis" by appellant of Situ's ailments, meriting reversal of the summary judgment motion. Lee testified that he did not know of a *written* diagnosis, not that he had no knowledge of any diagnosis. To the contrary, Lee, although he professed to a faulty memory, referred to the "Chinese way of diagnosis" in explaining his view of appellant's examination and treatment of Situ, and testified that "Doctor Yang specifically told us that Lucia Lai had the wrong diagnosis, and the wrong prescription for Boa [sic] Situ's medical conditions." Also, whether or not appellant made a specific "diagnosis" of Situ is not determinative here. The more relevant issue is that appellant allegedly prescribed an inappropriate remedy for Situ's ailments, regardless of whether this prescription resulted from a formal "diagnosis" or not. The trial court correctly concluded that the purported "new" facts did not alter its summary judgment analysis.

7. Respondent Lee's Motion for Sanctions.

Respondent Lee's motion for sanctions is denied.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Ruvolo, J.